

## 《論 說》

# National Policy for Families and the Elderly —— Evolving from Family Care to Public Support

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## I. INTRODUCTION

Time and again, history has taught us that severe social change brings with it major reforms to family law. For example, the French Revolution produced the French Civil Code in 1804, and the establishment of the People's Republic of China in 1949 brought with it a new Family Law. In Japan, in 1886 during the Meiji Restoration, the Meiji Civil Code was born, and the Second World War produced, in 1945, the current revised Civil Code. This does not mean to say that these laws and revisions were established easily. Changes in family relationships that accompany social revolutions give rise to great debates that traverses society. A new society and new family relationships are born to overcome the rivalry between societal changes and human consciousness.

Society and families have undergone extreme transformations that have been closely linked to these laws. In Japan, the high economic growth that consistently continued up until the 1980s spurred on the emergence of women into society, and brought about a more mature pension system, the trend towards nuclear families, and the new problem of the aged, which is closely linked to lower birth rates. In short, a multifaceted response to the problem of the aging society has become necessary. Not only do we require support for the aged, including economic assistance for the elderly, we also require nursing care for those who are bedridden and/or suffering dementia, and protection that includes assets management for those elderly people who have assets. The problems have become more serious and more complex in the 1990s since the bursting of the economic bubble. This paper will look at the above points, study the problems surrounding the care of the aged, introduce new legal systems, and consider the outlook for the future<sup>1)</sup>.

## II. THE ELDERLY AND THE FAMILY

### A. History of Assistance for the Elderly

It is said that the words “issues of the aged” began to appear frequently in politics and in the mass media in Japan from about the 1960s<sup>2)</sup>. This was a time of economic growth and we saw the signs of all the changes—including changes in the industrial structure, urbanization, the aging of the population, and changes in the family—that would become the catalysts for the problem of the aged.

How were the elderly supported in Japanese society before there was an awareness of the problem of the aged?

In the period following the Meiji Era (1890s) until the Second World War (1945), Japanese families were based on the *Iye* system. This was an “extended family system where, under the control of the head of the family, family businesses were operated with family assets, and where emphasis was placed on continued prosperity of the family line that transcended generations from ancestors down to their descendants”<sup>3)</sup>. The inheritor of the family estate (usually the eldest son) would be the sole inheritor of the family assets and thus the family assets would not be distributed and thus reduced. This ensured continuing prosperity. At this

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1) This paper is written to contribute to Festschrift in honour of Professor Marie-Thérèse Meulders-Klein on the occasion of her Professor Emeritus status at the Université Catholique de Louvain in Belgium.

2) See, Soichi Nasu & Yasuhiko Yuzawa ed., *Rojin Fuyo no Kenkyu: Rojin Kazoku no Shakaigaku (The Sociological Study on Family Help for the Aged)*, Kakiuchi Shuppan, 1970.

3) See, Fujiko Isono, “The Evolution of Modern Family Law in Japan” *International Journal of Law and the Family*, No. 2, 1988.

time, the inheritor of the family estate would also live with his parents and had the responsibility of looking after them when they grew old. This duty of support towards aged parents was not only stipulated in the Meiji Civil Code, but was further ensconced in the “filial piety” ideology based on Confucianism doctrine.

In this way, in Japan the support of aged parents was implemented privately in the *Iye*. Therefore, the public policies instigated by government relating to the support of the aged were, out of necessity, for those old people with no one to depend on, those who were not included in an *Iye*. The *Iye* system and the filial piety ideology meant that a series of systems were created where the causes of lifestyle problems for the aged were all considered to be the result of inadequate private effort within the *Iye*. Government welfare policies were kept to a minimum. This was very important in the formation of a rising capitalist state with centralized authority after the Meiji Restoration, and for social stability.

#### B. Catalysts for the Problem of the Aged

What were the major catalysts that revealed the problem of the aged? There were three major catalysts, the aging of the population, law reforms, and changes in industrial structures.

i) Aging of the population: One direct cause for the serious problem of the aged being faced by Japan is its aging population and the corresponding low birth rate. Since the Second World War, the aged population and the proportion of the total population represented by the elderly has continued to increase. The aging of the Japanese population is characterized in three ways. Firstly, there is the pace with which the population is aging<sup>4)</sup>. Secondly, the degree of aging is the highest in the world. In 1996, the average life span of Japanese males was 77.01 years, and 83.59 years for

females. In the year 2025, the proportion of the total population represented by people aged 65 and over is expected to be 25.8%<sup>5)</sup>. That is, one in every four people will be aged 65 or over. Thirdly, in the future it is predicted that the number of elderly people aged 75 and over will exceed the number of elderly people aged between 65 and 74. The significance of the first and second characteristics is that in a very short time Japan will arrive at an ultra-aged society such as has never been experienced in any country before. There is much instability about the future. The third characteristic means that the older we become, the more likely we are to be bedridden or suffering from dementia<sup>6)</sup>, and therefore the demand for assistance for the elderly will increase in the future. It is predicted that by 2020 there will be three million old people suffering from dementia. On the other hand, the low birth rate (the total special birth rate in 1997 was 1.39)<sup>7)</sup> means that the proportion of the population supplying the assistance

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4) The United Nations defines a country in which the percentage of the population over age 65 is more than 7% as an "aging society" and the country in which the percentage of the population over 65 is more than 14% is an "aged society". It took 150 years in France, 85 years in Sweden, and 45 years in England for the figure of 7% to double to 14%, but it took only 25 years in Japan, which shows how rapidly our society became aged.

5) The percentage of people aged 65 years or older in 2025 is expected to be 25.8% in Japan, 21.2% in France, and 18.5% in the United States.

6) According to the Health and Welfare White Paper published in 1996, the percentage of old people newly requiring care are, for bed-ridden people, 1.5% of people aged between 65 and 69, 3% of people aged between 70 and 74, 5.5% of people aged between 75 and 79, 10% of people aged between 80 and 84, and 20.5% of people aged 85 and over. For old people suffering from dementia who are not bedridden, these figures are 0% for people aged between 65 and 69, 0.5% of people aged between 70 and 74, 1% of people aged between 75 and 79, 1.5% of people aged between 80 and 84, and 3.5% of people aged 85 and over. In both cases, the rate goes up the older a person becomes.

7) The total special birth-rate, which means the average number of children one woman gives birth to in her life, is decreasing rapidly (4.32 in 1950, 1.46 in 1993, 1.43 in 1996, 1.39 in 1997).

will be decreasing and it will become difficult to have a supply that meets the demand.

ii) Law reforms: After the Second World War, the establishment of the new Constitution and the accompanying fundamental reforms to Civil Code (Fourth and Fifth Part: Family Law) abolished the *Iye* system. The demise of the *Iye* naturally was linked to the breakdown in the head-of-the-family inheritance system. The head-of-the-family inheritance system changed to a system where an inheritance was divided equally among siblings and so the foundation of the family, the family assets, was dispersed. This inevitably saw the emergence of the nuclear family as the minimum family unit in both economic and lifestyle terms. Since inheritances are spread evenly, it is natural that the duty of supporting parents is now the responsibility of all siblings equally. The fact that this duty of supporting parents came to be borne by all siblings likewise means that all siblings may consider it acceptable to neglect this duty. Of course, when a situation arises where supporting a parent is necessary, the law prescribes that all siblings consult with one another and discuss the best way to share the duties. However, in reality, it is difficult for children to carry out such duties when they are not living with their parents. Therefore, each year there are increasing numbers of elderly people who have been driven out of the family. Thus, the state or local public organizations had to replace the role of the *Iye* and social protection, which had been regarded as a favor bestowed by the state became regarded as a citizen's right. Such changes in lifestyle must not only bring about a revolution in consciousness, but in Japan too, the problem of the aged is now one of the main social problems.

iii) Changes in industrial structures: The progress of the Japanese economy after the Second World War brought about change in industrial structures. The proportion of primary industries rapidly decreased and in

turn, the proportion of secondary and tertiary industries increased. This change inevitably resulted in the movement of people away from farming villages to the cities. Nuclear families became more common, and the number of people living in each household decreased. In primary industries such as agriculture, old people could work as long as their health allowed, but in the secondary and tertiary industries people were forced to retire when they reached a certain age. The fact that income from work was cut off after retirement brought about a situation where new assistance for elderly people that had not been needed in the past was now required. This is the reason why a pension insurance system needed to be set up.

As described above, the current problem of the aged, has been revealed to be part of a complex web involving changes in population, law, and economics.

### C. Changes in Family Support

I do not believe that the family has ever been under greater threat than it is right now, a time when it is impossible to predict how the family will change in the future. The reasons for this are the increasing trend towards nuclear families, the destruction of the family relationship and a decline in the protective function of families<sup>8)</sup>. In the past, by sharing productive means and participating in production activities, families also shared consumer lifestyles. However, as wage earning households have become commonplace and work and the home have become separate, the "mutual insurance function" of families has been lost. The status and the functions of families have also completely changed. Family ties now refer only to

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8) See, Yoko Shoji, "Gendai Kazoku no kaigoryoku: Kitai, Genjitsu, Tenbo (The Caring Power of Modern Families: Expectations, Reality, and Outlooks)", *The Old Age Society and Home Care, Jurist Zokan*, April 1993, pp. 190-196

love and parent-child affection. The ties formed through the sharing of profit and loss, and advantage and disadvantage are almost non-existent now. If we force the care of elderly onto families where there is a reduced protective function towards the elderly, we may well see the complete destruction of the family relationship.

Before the problem of the aged revealed itself, two or three generations lived together. Based on the *Iye* standard, assistance towards the elderly was supplied completely independent of public assistance. Furthermore, the duty of supporting parents shouldered by mature children was prescribed as a top priority in the Meiji Civil Code, preceded only by the duty of care towards those children's own children or spouses<sup>9)</sup>. However, the *Iye* is now legally non-existent, and families, now with many choices regarding assistance towards the elderly, have also changed in terms of public policy and co-habitation.

For example, looking at the changes in the makeup of households in which elderly people aged 65 and over live, we can see that the number of those living with their children is steadily decreasing. There are more husband and wife households and more single person households. According to the Basic Citizen Lifestyle Survey, the 820,000 single person households in 1975 increased to 2,590,000 households in 1995 (more than 80% of these were female) and the number of husband and wife households increased from approximately 730,000 to 2,770,000<sup>10)</sup>. Furthermore, according to statistics that looked only at those elderly people living at home, the percentage of those aged 65 and older living with their children is decreasing year by year, at approximately 87% in 1960, 69.0% in 1980, 59.7%

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9) Meiji Civil Code, Article 957

10) Research Center for the Aging (ed.) *Korei Shakai no Kiso Chishiki (Introduction to the Aging Society)*, Chuo Hoki Shuppan, 1998. p. 27



in 1990, and 54.3% in 1996<sup>11)</sup>. The percentage of those living with their children depended on sex, region, age, and marital status, but generally more women lived with their children than men, more people in the country than in the city, more widowed than married, and more aged 75 and older than 65 to 74.

Some of the reasons for the decline in the co-habitation percentages are: that people's consciousness has changed and the older and younger generations no longer want to live with each other; that the number of children is relatively in decline and there are fewer of them to take in parents; that there are increasing differences in the lifestyles of the elderly and their children because of the movement of the young from the country to the cities, or differences because of the regions in which they live; and that the housing situation in the cities is extremely tight.

It is also important to note that the current way in which parents and children live together is different to that before the war. Firstly, there is more division between the lifestyles of the parent and child generations. There is a trend towards two household houses where both generations live under the same roof but have different entries and different kitchens and where household finances are also kept separate. Secondly, the time when co-habitation starts is changing. Not always does this start when the child gets married. It may start as a result of a grandchild being born or the parent becoming ill. Thirdly, in the past it was almost always the eldest son

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11) Ibid. p. 29. According to the "International Comparative Survey Relating To The Consciousness and Life of the Elderly," implemented in 1990 by the Office for Policies for the Elderly in the Prime Minister's Office, (respondents were 60 years or more), the percentage of people living with two other generations of family were 31.9% in Japan, 1.3% in the United States, 0.6% in Great Britain, 3.3% in Germany, and 38.1% in South Korea. As can be seen from these figures, the family structure for the elderly in Japan is not a European type but an Asian type.

who lived with the parents but recently there is an increasing number of houses in which the parents live with their daughter. Fourthly, the reason for living together is not always out of a sense of duty. There are some who choose to live together after considering living apart. Such modified stem families are now appearing. While they are extended families, they have quite different ideas about the degree of lifestyle sharing compared to the *Iye* system of the past.

Aged people themselves have a heightened awareness of themselves as independent, and with an expanded pension system there has been a drastic decrease in the number of cases that depend economically on their children<sup>12)</sup>. However, the nursing of bedridden elderly people or those suffering dementia is, as has always been the case, largely implemented by the family. For example, let us look at the nursing of bedridden elderly people. Except when those people live alone or are institutionalized, 90% of the care is done by the family. Most frequently, the nursing is done by women. Where the sufferer is male, the most common care-giver is the wife followed by the daughter-in-law. Where the sufferer is female, the most common care-giver is the daughter-in-law. Looking at relative figures, daughters-in-law are the care-givers in 33.4% of cases, spouses in 27.9% of cases, and daughters or sons in 20.6% of cases<sup>13)</sup>. However, there is an increasing tendency to emphasize nursing between couples rather than nursing between generations, and an increasing number of people who are showing interest in the active use of external services such as housekeepers,

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12) According to the Basic Survey of Citizen Lives implemented in 1991, when aged persons' average household income was classified, 52% came from annuities and pensions, 34% from income, and 12% from allowances or other. Approximately 47% of the aged households lived entirely on public annuities or pensions, showing the increasing tendency for reliance on these.

13) Basic Survey of Citizen Lives, 1992.

home-helpers, and other facilities. The younger the generation, the more this seems to be the case.

#### D. Changes in Policies Relating to Welfare for the Aged

As explained above, before the war the only aged people that could be recipients of welfare were poor people with no close relatives. However, because of the increasingly serious nature of the problem of the aged, in 1963 the Welfare for the Aged Law was established allowing welfare for all elderly people.

Historically speaking, policies relating to welfare for the aged have changed with a country's economic situation and the needs of its elderly population. After establishment of the Welfare for the Aged Law, there was a period of high economic growth and the country had abundant financial resources. In this period there was an increasing interest in the problem of the aged. Emphasis was placed on the establishment of facilities like nursing homes and medical care for the aged was free. However, after the effects of the Gulf War (so-called the oil shock), Japan's finances became tighter and policy directions underwent a change. Japanese-style welfare was proposed and the emphasis changed towards in-home welfare. Then, when the economy of Japan slowed down with the bursting of the bubble economy, to counteract the problem of the aged which was expected to become even more serious, a new community-type of welfare was started that looked afresh at providing community help. Expectations of volunteers and private activities are growing.

In 1986, the Cabinet decided upon a "Grand Plan for a Long-lived Society" and in December 1989 the Gold Plan, a 10-year strategy to promote health and welfare for the aged, that spoke of a "comprehensive future outlook for achieving a bright and active long-lived society". This

was implemented from the 1990 financial year with the agreement of the ministers from the Ministries of Health and Welfare, Treasury, and Local Government. This Gold Plan was pressured by the need for a comprehensive review to match the increasing aging of society and thus it was overlaid with five-year numeric goals for the period from 1995 through to 1999 as a modified New Gold Plan. The numeric goals of the Plan are home-helpers (170,000 people), day service centers (17,000 places), short-stay facilities (60,000 residents), and special nursing homes (290,000 residents), home nursing service centers (10,000 places), health facilities for the aged (for 280,000 people), and care houses (for 100,000 people). Budgetary measures are also being forecast.

The basic concept of the Gold Plan is to promote a home nursing system. We can sympathize with elderly people who hope to receive nursing without having to leave their land or home where they have lived for many years. To help achieve this, the Gold Plan allows for the preparation and expansion of facilities for home-helpers, day service centers, and short-stay centers. On the one hand, there is the pressing concern of a rapidly emerging old-age society caused by longevity and low birth rates. On the other, changes in families brought out by the trend towards nuclear families and the emergence of women in society mean that the nursing function of families is in decline. It cannot be denied that the Gold Plan is attempting to supplement and thereby enhance the nursing function of families, and that it assumes a duty of care for families.

However, is it appropriate for people to be imposing such a duty of care as a legal duty when we consider the various environmental changes associated with the elderly as explained above?

### Ⅲ. DUTY TO SUPPORT ELDERLY PARENTS IN CIVIL CODE

#### A. Duty to Maintain Life and Duty to Support Life

The Civil Code stipulates that direct blood relations and siblings have a mutual duty of support<sup>14)</sup>. The Code also gives an exception, stipulating that in special circumstances, the Family Court may absolve people of this duty of support even if they are relatives within the third degree of relationship by blood<sup>15)</sup>. Recently, there have been many criticisms that show the range of relations from this duty of support is too large.

Professor Zennosuke Nakagawa (1897-1975) proposed the two types of support described under the duty of support in his interpretation of this law. These two types are different in quality, one being the duty to maintain lifestyle, and the other being the duty to support lifestyle. Firstly, there is the duty of support for the basic family unit, that is, a married couple and their children who have not yet reached adulthood. Secondly, there is the duty of support for other relatives. The former is a duty to give support of the same quality and living standard as a person gives themselves. The latter is a duty of support that arises if a party has the capability in their own lifestyle to allow such support. This interpretation has long been generally accepted since it was proposed during the transition period from a society based on extended families to a society based on nuclear families, it has been a great achievement to point out those qualitative differences.

The duty of support of children to their parents is the duty to support their lifestyle. In a number of examples, courts have determined that “the

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14) Civil Code, Article 877, Section 1

15) Civil Code, Article 877, Section 2

degree to which a mature child shall support their elderly parents shall be given an equivalent to the amount that is found after a child cuts back on expenses without damaging their social lifestyle or position in society"<sup>16)</sup>. Furthermore, it is accepted that "it is enough to support someone using the allowance that arises after a befitting lifestyle including social standing and income, and the living expenses to be provided shall be calculated by the criteria of the Daily Life Protection Law"<sup>17)</sup>. It should be noted here, that the duty of support of children to their parents arises first when there is the capability in the child's life to do this. It is not something that always arises.

#### B. Duty of Care and Support

In the Meiji Civil Code, the method of support was prescribed as follows. "The person with the duty of support, shall, according to their own choice, either take charge of and care for the person to be supported, or not take charge of but provide living expenses for that person"<sup>18)</sup>. In contrast, the current Civil Code stipulates that there be consultation between the parties involved regarding the order, degree, and method in which support be given by the person with the duty of support. The Family Court will preside when agreement is not reached through such consultation<sup>19)</sup>. There are no specific prescriptions relating to the method of support. However, under the

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16) Tottori Family Court Yonago Branch Judgment on April 11, 1969, *Hanrei Times*, No. 247, p. 329, Kushiro Family Court Judgment on December 26, 1972, *Katei Saiban Geppo (Monthly Bulletin on Family Court)*, vol. 25, No. 8, p. 60, etc.

17) Osaka High Court Decision on June 19, 1974, *Katei Saiban Geppo (Monthly Bulletin on Family Court)*, vol. 27, No. 4, p. 61, etc.

18) Meiji Civil Code, Article 961

19) Civil Code, Articles 878-879

current law it is generally believed that there are two types of support, one being taking in and caring for the person requiring support, the other providing financial support for that person.

There is probably no argument relating to the duty in law of children (where this support can be executed) to provide financial support as economic assistance to elderly parents requiring that support. However, the person who should bear the duty under law of providing care and nursing for elderly people requiring nursing is another issue. The nursing of elderly parents by both parents and children living together is a traditional virtue of Japanese society and it has long been said that co-habitation is one of the characteristics of the Japanese-type of welfare. However, nursing of the elderly is not a problem that can be addressed merely by cutting back on one's own living expenses. As the parents become older, medical problems become more serious and when the parent becomes bed-ridden or suffers from dementia it is difficult to avoid for children to nurse him or her for long periods. We cannot dismiss the fears that this will affect not only the life of the care-givers themselves, but will also adversely affect the life of the entire family. In addition, as seen above, it is most common for the daughter-in-law (eldest son's wife) to implement the actual nursing of the elderly parent with the duty of care that first arises after an instruction by the Family Court is actually implemented by the daughter-in-law within the family. Supposing even that the Court instructed the parent's actual child to take charge of and support their parent, it would not only be impossible to enforce this but would also tend to cause deep splits between those responsible for the support. Accordingly, there are strong criticisms that a legal duty to take in parents is not appropriate.

## C. Duty to Take In Parents as Seen in Cases of Family Court

In the Civil Code, when the relevant parties cannot reach agreement through consultation, the Family Court presides in judgment and determines the order and method of support. Unexpectedly, despite the rapid increase in the number of elderly people, disputes regarding support that are brought to the Family Court are decreasing in number each year. While there has been a substantial increase in the number of cases relating to the allocation of money for marriage expenses, disposal of money relating to children's care and custody, and division of inheritances, cases relating to support have decreased in number. The total number of new cases received by the Tokyo Family Court, including both court cases and mediation in 1992, represented a 45% decrease from the number received in 1985<sup>20)</sup>. Reasons for this may include the fact that under measures provided by all welfare laws for the aged and the Daily Life Protection Law, there are more avenues available for emergency help, the fact that there are more private and public nursing homes, and the fact that, in general, people have more leeway because of the general improvement in the economic standards of the Japanese, and more than anything, the fact that the popularization and maturing of pension systems have assisted the economic independence of elderly people themselves, meaning that they do not totally rely on their children but can use or purchase nursing services themselves. While the number of cases has decreased, the cases actually brought before the Family Court involve more serious disputes than previously. In the past, many cases involved people seeking assistance because of poor economic circumstances. Now, there are more cases where people are seeking

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20) *Katei Saiban Geppo (Monthly Bulletin on Family Court)*, vol. 46, No. 1, p. 7



adjustments to parent-child relationships associated with living together, and cases where inheritance and support are closely related, such as when the court is asked to evaluate the contribution to the nursing of elderly parents at the time of inheritances<sup>21)</sup>.

It goes without saying that the problem of children and parents living together is one of the basic considerations involved as the government promotes its home nursing policies. Although taking charge and caring for the elderly is generally approved of as a method of support, there are many cases in court where this has been denied. Most of these are not denying that taking in a parent for support is one way of fulfilling the duty of support, they are merely stating that in some circumstances it is not appropriate to order that a person takes their parent in. Let us look at some cases where courts have ordered that parents be taken in and other cases where they have denied this.

Decision dated 31st March 1981 by the Sendai Family Court<sup>22)</sup>: Seven siblings that were not well disposed to one another all refused to take their elderly mother into care and she refused to go into a nursing home. The court ordered that one of the children take the mother in. "None of the parties wanted to take her in and the option for the judge was to order that they put the mother into a nursing home and share the expense. However, the mother was vehemently opposed to this, so the judge had to charge one of the children with the duty of taking her in. The third single son grudgingly agreed to take her under the following conditions: that the other children pay for her living expenses equally. Therefore the court orders him to take her in."

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21) See, Masakazu Ueno, "Saikin no Roshin Fuyo no Saibanrei to Hoteki Mondai (Recent examples of Court Orders Relating to Support of Elderly Parents)", *Horitsu no Hiroba*, December 1986, p. 45

22) *Katei Saiban Geppo (Monthly Bulletin on Family Court)*, vol. 33, No. 12, p. 93

If one of the children, even grudgingly shows any intention of taking the parent in, the trend in the Family Court is to order that that child do so. Where the father or mother indicates a desire to stay in a nursing home, their feelings are taken into account and they are left to continue their life in the nursing home (for example, in the decision dated July 21, 1980 by the Hiroshima High Court, Matsue Branch)<sup>23)</sup>.

However, I believe that the legal approval of the duty of taking in a parent, even if the method of support that should be undertaken by the responsible party is possible, is too harmful. If someone takes their parents in as a legal duty, the parent then just gets passed around between the children. Not only is it difficult to believe that a parent would receive adequate nursing where someone has been forced to take them in, but it is also possible that the child's family could break up and totally collapse. Also, if we take the stance that the duty of taking in a person should be approved as a legal duty, even in Family Court mediation, there is no guarantee that children would not be forced to take in a parent after their affection or morality is questioned. Of course, we should not be grudging of support if the children express a wish to nurse their parents but legal coercion is not desirable. We should proceed by removing the legal duty of taking in parents.

Not only when an elderly person requiring nursing does not want to rely on their family, but also when they live with their family, various types of public assistance are essential. Therefore, I would next like to touch slightly on the Public Care Insurance Law established at the end of last year.

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23) *Katei Saiban Geppo (Monthly Bulletin on Family Court)*, vol. 34, No. 5, p. 57

## IV. PUBLIC CARE INSURANCE LAW FOR THE ELDERLY

### A. Outline of the Law

The Public Care Insurance Law for the Elderly was established on December 17, 1997 as one response to the issue of Japan's aging society<sup>24)</sup>. This law is due to be enacted on April 1, 2000.

This law was established to serve the need to set up a public care insurance system for the elderly that would provide those who needed care, in accordance with their abilities, the medical care services and welfare services required to allow them to lead independent lives. The following is a summary of this law:

- (1) The main insurer is the city, town, or village. National government, prefectural, and other medical insurers shall, in accordance with their role, give supplementary assistance.
- (2) Insured parties shall be persons aged 65 or over (first insured party) and persons aged 40 or more but less than 65 with medical insurance (second insured party).
- (3) The premium shall be the same for all citizens aged 40 and over.
- (4) The revenue source for care insurance shall be provided from the above insurance premiums and public funds to the value of half of the total income of insurers.
- (5) Payment of care insurance
  - a) Recipients shall be those suffering dementia associated with aging (and requiring care) and feeble older people (requiring assistance) who are

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24) See *Jurist*, No. 1127, February 1998, p. 152, Tsuyoshi Miyatake, *Kaigo Hoken no Subete (All About Care Insurance)*, Hoken Dojinsha, 1997, and Mitsuru Ishikawa, *Kekkan Kaigo Hoken (Defective Care Insurance)*, Jichitai Kenkyusha, 1998.

on their way to becoming demented.

b) Recipients shall apply for insurance as they wish (where necessary, this may be done by relative or a Welfare Manager), and services can be selected.

c) Insurance starts being paid after the person in question is acknowledged as being in need of care by a specialist team selected by the insurer. An appropriate plan of care may also be requested of a care planner.

d) Payment details: As a rule shall be paid in kind.

[In-home services]: Home help, day services, rehabilitation, short-stay services, visiting nurse, welfare equipment services, home improvements, visiting bather, care management, etc.

[Facility services]: All special nursing homes for elderly people as total life care, health facilities for elderly people (requiring fee), medical beds required for medical care of sick people, hospital wards for people suffering from senile dementia, etc.

(6) Care and welfare services can be provided by private operators and non-profit organizations specified by the insurer under the same conditions as public entities. The insured party can freely select any service.

(7) Each prefecture shall establish a care insurance investigating committee, as a third-party institution, that can provide unbiased judgments relating to matters such the acknowledgmenet of need of care.

## B. Discussion Points Associated With the Law

Generally, many legal experts have expressed misgivings, described below.

Firstly, there is the issue of institutions and labor. There are questions as to whether there will be a sufficient number of institutions for the elderly who will require institutionalized care by the year 2000, or whether there

will be a sufficient number of day service centers that will look after the elderly or rehabilitate them during the day, or if home-helpers are to be dispatched to people's homes, how will these home-helpers be secured and educated?

Secondly, there is the issue of ranking recipients according to those requiring care and these requiring support<sup>25)</sup>. Who will decide this ranking, will there not be a lack of uniformity in their criteria depending on their individual judgment, and will there not be a great number of cases left over of people who are deemed as not needing care? These questions are still unanswered. There is also the potential for the elderly or their families, in their desire to be recognized as being in need of care, to neglect efforts to help themselves and to deliberately make their situation worse (the individual becomes bed-ridden, or the family causes him or her to become bed-ridden).

Thirdly, there is also a fear that discrepancies in the quality and volume of care will emerge depending on the region. Should differences in services arise due to the initiatives taken by each city, town, or village, or the financial resources of special wards, people may tend to cluster in those areas where the services are better and remote areas with poorer services will become depopulated.

This bill was passed in rather a short period after the discussion about public care insurance was inaugurated and there are still many points that need to be clarified.

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25) With respect to this point, the delays and discrepancies that emerged from Germany's criteria for recognizing those requiring care indicated these problems. See, Kazuaki Tezuka, "Doitsu Kaigo Hokenho no Seiritsu to Tenkai (The Establishment and Development of Germany's Public Care Insurance Law)", *Jurist*, No. 1084, February 1996, pp. 93-94.

## V. THE ESTABLISHMENT AND PROGRESS OF THE ADULT GUARDIANSHIP LAW

### A. Background to Establishment of Adult Guardianship Law

In Japan, the issue of management of the assets of the elderly has recently been in the spotlight. As the number of elderly suffering from senile dementia increases, this problem will also clearly intensify. However, there is still no special system in place to deal with this issue.

The question of who will manage one's assets if one suffers from dementia is one that everyone worries about. And from the point of view of the children, the question of who is to manage their parent's assets should they suffer from dementia often becomes a bone of contention amongst them.

In contemporary Japan, the only system that addresses this issue is the adjudication of incompetency or quasi-incompetency<sup>26)</sup>. This system was stipulated in the Civil Code of 1898 and it states that the assets of persons of unsound mind and body who have been adjudged incompetent by the Family Court shall be consigned to a guardian appointed by the court and the power to deal with their own assets shall be taken out of their hands. While this may have the purpose of protecting the person adjudged incompetent, it tends to ignore the personal rights and thoughts of that person. There is also the fear that when that person is recorded in the *Koseki* (family registration system) as having been adjudged incompetent, he or she will be the object of social prejudice.

The introduction of the Adult Guardianship Law is being considered as

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26) Civil Code, Articles 7-13

an alternative system for this situation. In September 1997, the Law Commission (Legislative Council of the Ministry of Justice) started to revise the system of adjudication of incompetency and quasi-incompetency and officially announced a report on the establishment of a new Adult Guardianship Law to cope with the growing number of elderly people suffering from senile dementia<sup>27)</sup>. The Adult Guardianship Sub-committee newly set up in response to this report has been continuing a full-scale inquiry since October 1997, and in April 1998, it officially announced a summary of a draft proposal<sup>28)</sup>. After seeking opinions from all related fields, the Ministry of Justice intends to present a bill for Civil Code reform to the Adult Guardianship system based on the report of the draft proposal by the beginning of 1999.

#### B. The Outline of the Draft Proposal

The outline of the draft proposal presented by the Adult Guardianship Sub-committee is as follows:

- (1) First, harmonize the notion of "Protection of the person" under the present law with the new notion of "Respect for self-determination". "Weight given to the remaining capabilities of the demented person", and "Normalization", and to revise the current black-and-white rigid system to make it more flexible, resilient, and easier to use in response to an aging society and the welfare of the disabled.
- (2) With regard to a new system, to change the current double-classification nature to make it more flexible, changing words to "assistance (*Hosa*)"

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27) *Jurist*, No. 1121, October 1997, pp. 87-100

28) Ministry of Justice, Civil Affairs Bureau, Counselor's Office, "Outline of the Draft Proposal Relating to the Reform of the Adult Guardianship System", *Jurist*, No. 1133, May 1997, pp. 233-237

classification" and "guardian (*Koken*) classification", and establishing a new "general aid (*Hojo*) classification".

The classification of "general aid" is a new one and it targets people who are not feeble-minded but who do not possess sufficient capacity to make judgments and therefore require care (people with slight senile dementia, intellectually or mentally disabled people, autistic people, and others requiring care). If the Family Court determines that general aid should begin and the selection of a helper should be granted, on application, the helper is granted both or either the right of rescission and/or the power of attorney for specified legal actions. To preserve a respect for the self-determination of the person, an application by or consent of the person is required.

The "assistance" classification corresponds to the existing quasi-incompetency adjudication and targets people who are feeble-minded (as regards the degree of mental disability, to have reached a state where the capacity of judgments is obviously impaired). As in the current legislature, the assistant is granted the right to consent with regard to important legal actions. Also, from the point of view of protecting the rights of the person in question, the assistant is granted the right of rescission in important legal actions and the power of attorney on application in specified legal actions. To preserve a respect for the self-determination of the person, an application by or consent of the person is required.

The "guardian" classification corresponds to the incompetency adjudication in the current law, and targets people who have lost their mental capacities. In principle, total right of rescission and power of attorney are granted to the guardian. However, from the new point of view of respecting the person's remaining capacities, the person should be able to independently carry out actions limited to those required for everyday life.

The above three classifications are used in accordance with the person's



ability to make decisions. Furthermore within each classification, the details of protection, right of rescission, and power of attorney can be set individually in accordance with the degree of ability to make judgments and the need to make such judgments.

Power of attorney shall be allocated to the Manager of the Welfare office to speedily put in place appropriate adult guardianship of the elderly suffering from dementia with no close relatives.

(3) With respect to the current requirement to record incompetency in the *Koseki*, in light of people's psychological resistance to this and the fact that it obstructs the use of the system, the abolishment of this system and the use of a different means of notification are under discussion.

(4) The following reforms are to be carried out to create a new adult guardianship system (including helpers, assistants, and guardians).

To permit more than one adult guardian to be appointed in response to the diversification of user needs and in the interests of broadening the selections wings of the Adult Guardian system. This would allow bodies such as the Social Welfare Council to carry out their adult guardianship obligations, to stipulate that these corporations can be appointed as adult guardians.

To concretely stipulate the circumstances that need to be taken into consideration when the Family Court is considering the appointment of adult guardians.

Since there is an intimate connection between asset management and physical supervision (such as medical treatment and care), to establish regulations that state the obligation of the adult guardian concerning the physical care of the person.

(5) Currently under investigation are cases where the person has chosen who they would like to have power of attorney. Should all business that reflects the feelings of the person be handed over to the chosen party even

after the judgment ability of the person has deteriorated, and should there be legislation for a power of attorney system that comes under the supervision of a public institution?

Certainly, with regard to the issue of Civil Code reforms of the adult guardianship system, as mentioned above, it is vital that a flexible, resilient, and easy-to-use system be designed from the viewpoint of harmonizing the principle of respect for self-determination and the principle of protection of the person and one that sufficiently considers the social conditions in which elderly people and those with senile dementia find themselves. Based on these principles, the draft proposal indicates the direction of the findings of the investigation of the Adult Guardianship Sub-committee. As we face the 21st century, we need to proceed with the comprehensive establishment of laws for the support and welfare of the elderly and those who have senile dementia by clarifying and linking the roles of the Civil Code, social welfare laws, and welfare policies<sup>29)</sup>.

## VI. CONCLUSION

In looking at assistance for the elderly in relationship to families, we have now reached a time when we must expel the "myth of the family", in which the family resolves all problems in life. Even when we analyze the problem of the aged, we must discard the preconception that assistance for the elderly will be provided by the family. Instead we must take the

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29) Regarding adult guardianship, *Atarashii Seinenkoken Seido wo Mezashite (Towards a New Adult Guardianship System)* edited by Aiko Noda (1993) is a valuable document. She heads the Right Protection Committee of the Tokyo Center for the Protection of the Rights of the Mentally Weak and Elderly with Senile Dementia (STEP) which has been steadily pursuing these matters since its establishment in 1991.

viewpoint that elderly people are individuals. As described above, the traditional care and support of elderly parents at home is collapsing with the diversification of families and as the individual is becoming increasingly important.

In the past, the pressuring between siblings with the duty of supporting elderly parents was figuratively known as “passing the buck around”. However, in this age of the low birth rates, there may be no one to pressure and the responsibility for elderly parents may rest on the shoulders of one child alone. If two single children marry each other, and both of them are only children, in the worst case they could be caring for four elderly parents. Couples having no children and people who remain single are already disconnected from the inter-generational chain in which elderly parents are supported. There are some families who have always disliked intervention from other people and there are cases where the closed nature of the care has resulted in the neglect of some elderly people. What is therefore needed is the socialization of care. Even if an elderly person requiring care lives alone, if there is some public care service available, then impediments to a normal life can be removed and assistance given to improve independence. Even if an elderly person is being cared for by his or her family, the burden on the family can be lightened through some public care services thus preventing family breakdowns. If we can establish a system where elderly people themselves can select the type of care services they require, we shall be respecting the autonomous decision of the elderly and promoting independence.

In Japan, the word “normalization” has come into use only recently. If the disabled and elderly want to continue living in homes and areas to which they are accustomed, we should enable them to do so. Only a society in which the disabled and elderly are encompassed in such a way that they may live a life similar to other people can be called “normal”. In

Scandinavian countries, this concept was firstly preceded by institutional welfare. There was then an increasing call for “in-home” welfare as opposed to this institutional welfare. Currently, in Scandinavian countries, elderly people can receive welfare whether they are at home or in an institution, and in-home welfare exists as one of the options available. However, in Japan there is still insufficient institutional welfare available and there is a strong feeling that a gradual move towards in-home welfare should be started. Furthermore, when we talk of in-home welfare in Japan we do not assume that the elderly person lives alone but that they live with their family and that welfare would be used to supplement this care. It is quite possible that confusion could be caused because of this premise. Of course one of the major causes for this are financial problems. If there is no room for choice, they may as well be no services available. One of the major issues for the future is the guarantee of choice for welfare service users. That is why this is a current political issue in Japan.

So that we can “respect the wishes of the elderly themselves and provide them with a quality, independent life”<sup>30)</sup>, it is urgent that we achieve cooperation between health, medical, and welfare services. As described above, the Adult Guardianship law and the Care Insurance Law can be expected to function as laws that focus on the individual and not on the family.

In world terms, in the period during which the modern state was being formed, there were many state controls over society and families. This achieved a certain degree of social stability. Next, the autonomy of the family was respected and intervention by the state was avoided where at all possible. The spotlight then fell on the rights of wives and of children, that is the rights of the weak individuals in a family. To protect the rights

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30) Report of the Committee Investigating Insurance for the Elderly, “Creating a Care Insurance System for the Elderly”, April 1996

of these individuals, the state again found itself in a position where it had to intervene in families. In July 1997, the Ninth World Conference of the ISFL (International Society of Family Law), opened in Durban, South Africa, revealed common worldwide trends regarding the relationship between the state, society, and families. When the spotlight fell on the elderly, we realized that Japan, too, has arrived at a time when the socialization of care is required, when universalism in which care for the elderly shifts from private to public, from the family to the state, must be adopted.

<後記>

本稿は、前国際家族法学会（ISFL）会長、Marie-Thérèse Meulders-Klein教授（ベルギー・カソリックドルーバン大学）の名誉号授与記念論文集に寄稿するため書かれた論文を加筆・修正したものである。